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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 76

TRAVELERS HEALTH ASSOCIATION AND R. E. PRATT, AS TREASURER THEREOF AND IN HIS PERSONAL CAPACITY,
Appellants,

vs.

COMMONWEALTH OF VIRGINIA AT THE RELATION OF THE STATE CORPORATION COMMISSION,
Appellee

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA

APPELLANTS' BRIEF IN REPLY TO BRIEF FOR THE APPELLEE

BROWN, HUBBARD, FELT & FULLER,
First National Bank Building,
Utica, New York;
HUNTON, WILLIAMS, ANDERSON,
GAY & MOORE,
Electric Building,
Richmond, Virginia;
Counsel for Appellants.

MOSES G. HUBBARD, JR.,
THOMAS R. GAY,
H. MERRILL PARCO,
Of Counsel.

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Introduction

A reading of the Brief of Appellee indicates the need of a reply in order to clarify the positions of the respective

parties both as to the facts and the law. We propose briefly to emphasize the following points:

1. Appellee does not and can not affirm the accuracy of the alleged facts upon which the Virginia Supreme Court of Appeals relied in rendering its decision.

2. Appellee presents three inconsistent views as to the nature of this proceeding and of the Order under review.

3. Appellee misconstrues Section 6 of the Virginia Securities Law as well as appellants' position regarding it.

4. Appellee misinterprets the constitutional issues presented on this appeal.

Point I

Appellee Does Not and Can Not Affirm the Accuracy of the Foundation of Alleged Facts Upon Which the Virginia Supreme Court of Appeals Relied in Rendering Its Decision

As we have pointed out in our original brief (pages 22-27) and in our Brief in Reply to Appellees Statement Opposing Jurisdiction (pages 4-7), the Court in order to sustain its decision assumed a foundation of fact directly contrary to the facts specifically stipulated by the parties. Although in Appellee's Brief the Attorney General (pages 5-7) now refers to the facts as found by the Virginia Court, he very carefully refrains from asserting even indirectly the accuracy of such facts. He could not in good conscience do otherwise because he knows that the facts contained in that opinion do not come within the stipulated facts as understood and acted upon in this proceeding by the parties thereto. As additional substantiation we point out the following:

A. In its original order instituting these proceedings the State Corporation Commission stated "that the

Travelers Health Association appears to be an insurance company doing in Virginia only a mail-order business * * * " (R. 7).

B. In Appellee's Brief on this appeal there appears the following significant statement: "The fact that *neither the appellants nor their agents are present in Virginia* is not material." (Appellee's Brief 14), (Emphasis supplied).

C. In his Brief before the Virginia Court the Attorney General at page 2 conceded that the "Actual contract of insurance is made in Nebraska."

D. In its opinion the State Corporation Commission made the following statement of fact (R. 20): "Respondents rely on the fact that their contacts with citizens of Virginia are by mail, that they are not doing business in Virginia, and that they do not enter Virginia either personally or by agents * * * *They are not charged with doing business in Virginia* * * *"* (Emphasis supplied).

In passing, we submit that since the State Corporation Commission concedes that appellant is not charged with doing business in Virginia, the fundamental basis upon which the State of Virginia, has attempted to obtain jurisdiction through service of process by mail falls of its own weight.

Point II

Appellee Presents Three Inconsistent Views As To the Nature of This Proceeding and of the Order Under Review

In discussing the nature of this proceeding and of the Order under review, appellee asserts three inconsistent and contradictory positions, *First* that the Order is purely di-

rectory with no binding effect upon appellants, and that therefore service neither of process nor even of notice was required in order to permit the making and entry of the order (Appellee's Brief, 22, 23). *Second*, the interpretation made by the Supreme Court of Appeals that "the inquiry is quasi criminal in its approach" (R. 36); and *Third*, the New Jersey position advanced in the case of *Wilentz* v. *Edwards*, 134 N. J. Equity 522, that the Court can issue an injunctive restraining order after substituted service and that whether or not contempt proceedings would thereafter lie for violation of the order need not be determined until a violation has occurred (Appellee's Brief, 25, 26).

Appellee does not directly assert the validity of the position taken by the Virginia Court that the proceeding is quasi criminal in nature. It is obviously embarrassing in one breath to assert that effect of a proceeding with an ensuing restraining order has no more weight or binding effect that a notice published in the paper, and in the next breath to assert that the proceeding and order are quasi criminal in nature and that the defendants are therefore fortunate that instead of indictment and extraditement a more benign proceeding involving only civil process was substituted (R. 39, 40).

The proceeding can not be "merely directory" and at the same time "quasi criminal". Appellee therefore seems to adopt the "merely directory" theory, but at the same time cites the authorities used by the Virginia Court in discussing the criminal nature of the proceeding (Appellee's Brief 15-19, R. 36, 38, 39). The statute by its terms provides that "the proceeding shall be analogous to and in accordance with proceedings in equity for injunctions", (Appellants' Brief Appendix 40) and it is generally recognized that injunctive orders in equity are not merely "directory"

but are definitely so mandatory and in personam as to require personal service of process within the jurisdiction.

Freeman v. *Alderson*, 119 U. S. 185, 187-189;

Indemnity Insurance Co. v. *Smoot*, 152 Fed. (2) 667, 670 (Cert. denied 328 U. S. 835);

Hart v. *Sansom*, 110 U. S. 151, 155;

National Bond and Investment Co. v. *Gibson*, 6 Fed. (2) 288, 290 (Cert. denied 273 U. S. 668);

National Surety Company v. *Austin Machinery Co.*, 35 Fed. (2) 832, 833, 844 (Cert. denied 280 U. S. 614).

In *Freeman* v. *Alderson*, this Court declared the law regarding personal service of process to be as follows:

> "For any further adjudication, the defendant must be personally served with citation or voluntarily appear in the action. The laws of the state have no operation outside of its territory except so far as may be allowed by comity; its tribunals can not send their citations beyond its limits and require parties there domiciled to respond to proceedings against them; and publication of citation within the state can not create any greater obligation upon them to appear."

Again in *Indemnity Insurance Company* v. *Smoot* certiorari was denied after the Circuit Court had said at page 670:

> "But by tradition equity is said to act only in personam and this principle is of nearly universal application".

In *Hart* v. *Sansom*, the Court at page 155 declared, when referring to a proceeding in equity:

> "Such a decree being in personam merely can only be supported against a person who is not a citizen or resident of the state in which it is rendered by

> actual service upon him within its jurisdiction; and constructive service by publication in a newspaper is not sufficient".

When referring to cases involving exercise of police power against an individual the Circuit Court of Appeals in *National Bond and Investment Company* v. *Gibson*, said:

> "* * * It is the punishment and prevention of crime against which the police power of the state is directed. In all such cases the defendant is looked upon as the wrong-doer, the party to be punished, and all such actions are actions in personam".

Certiorari was thereafter denied (273 U. S. 668).

The least justifiable position is the third one. It seems elementary that the liberty and property of any person have been invaded when an order is entered enjoining and restraining activities constituting his regularly established business and that it is no answer to say that whether the order is enforceable need be determined only after it has been violated. He should not be required at his own risk by a continuation of his business activities to ascertain whether he is or is not subject to punishment for contempt, or to fine and imprisonment. Especially is that true when the statute provides, as does the one under review, that the action of the State Corporation Commission "shall be conclusive in any court in the State in any matter civil or criminal upon the same state of facts" (Appellants' Brief, Appendix 40).

Point III

Appellee Misconstrues Section 6 of the Virginia Securities Law As Well As Appellants' Position Regarding It

Appellee at page 13 of its Brief, concedes that there is no suggestion that the membership certificates issued by the appellants were fraudulent, misleading or inferior,

but says "That is not the question". It then continues: "While the securities may be entirely satisfactory, their contention that they are not subject to supervision by Virginia because of the manner in which they do business would be just as valid if applied to the most unsatisfactory and worthless securities".

What appellee has overlooked is the wording of the statute itself which is sought to be enforced. We submit that a proper reading of Section 6 of the Virginia Securities Law permits "a cease and desist order in the nature of a temporary injunction and restraining order" only where, as one of the elements in connection with the sale or promotion of securities "it appears that a fraud, legal or equitable, intentional or unintentional, is being perpetrated and/or attempted in connection with the disposition or attempted disposition of securities" (Appellants' Brief, Appendix 39).

It is our position that whatever interpretation may be placed upon this Statute the Commonwealth of Virginia has in no event the constitutional authority to prohibit the appellants from performing in Nebraska their proper and customary business activities which, pursuant to the supervision and regulation of the Nebraska Insurance Department, they have a right under Nebraska Law to perform. Hence, under the quoted limitations of Section 6, the interpretation that has been placed upon it by the State of Virginia is even more unsupportable and more clearly unconstitutional as applied to these appellants because there is no contention or even insinuation here that any fraud, legal or equitable, intentional or unintentional, is being perpetrated and/or attempted by these appellants. On the contrary it is conceded that appellants are reputable and that their certificates of membership are not subject to criticism (R. 1, 2; Appellee's Brief 13).

Appellee also emphasizes that "appellants admit that their membership contracts constitute 'securities' " within the meaning of the Virginia Blue Sky Law (Appellee's Brief, 3). Then at page 18 it asserts that just as federal protection of the liquor traffic has been withdrawn by the Wilson Act and the Webb-Kenyon Act, so has federal protection been withdrawn from the promotion of the sale of securities through the United States mails by means of the enactment of Title 1, Section 18 of the Securities Act of 1933 (Title 15, Section 77 of the U. S. Code Annotated).

We concede that in the Virginia Act the definition of a "security" specifically includes membership certificates, but whether such membership certificates no longer are protected in interstate commerce is dependent upon the definition of a "security" contained in the Federal Securities Act. Reference to Title 15, Section 77-b of the U. S. Code Annotated establishes that in the Federal Statute a membership certificate such as ours is *not* included under the definition of a "security". It follows that the provision of the Federal Act quoted by appellee at page 18 of its Brief does not apply to appellants' membership certificates and that they are therefore still protected in interstate commerce through the mail.

Point IV

Appellee Misinterprets the Constitutional Issues Presented on This Appeal

At page 31 of its Brief, appellee makes the following statement:

> "The appellants assert that they may illegally promote the sale of securities in Virginia by use of the mails • • • The appellants obviously wish to continue certain activities in Virginia, else they would not be complaining of an order which simply directs them not to do certain things in Virginia."

Again at page 19:

> "This is not such a case as was presented in New York Life Insurance Company *v.* Head, 234 U. S. 149, or in Hartford Accident and Insurance Company *v.* Delta and Pine Land Company, 292 U. S. 143, where one state attempted to extend the effect of its laws beyond its borders so as to destroy and impair the rights of citizens of other states to make a contract *not operative within its jurisdiction* and lawful where made."

These statements by Appellee are in direct conflict with appellants' position. Appellants assert that the State of Virginia *is* attempting to extend the effect of its laws beyond its borders so as to destroy or impair their rights as citizens of Nebraska to make contracts not operative in Virginia and lawful in Nebraska where made. They assert that their activity in securing members throughout the United States and of issuing membership certificates to them in Nebraska is entirely legal; is confined to the State of Nebraska; is not only lawful in but is supervised by the State of Nebraska; involves contracts to be carried out solely within the jurisdiction of Nebraska; and that the promotional activities which Virginia seeks to enjoin are incidental to the negotiation, consummation and performance in Nebraska of contracts between the defendant Association and its prospective members. We take the position adopted by this Court in *Connecticut General Insurance Company* v. *Johnson* 303 U. S. 77, and cases there cited, in which the Court said at pages 80-81:

> "But the due process clause denies to the state power to tax or *regulate* the corporation's property and *activities* elsewhere". (Emphasis supplied.)

It is our position therefore that the statute in question as interpreted by the order made by the Virginia Commission subjects Nebraska citizens doing business only in Ne-

braska to the process and jurisdiction of Virginia Courts and Commissions and deprives them, without due process of law, of their constitutional right to engage in lawful business within the state of their domicile.

Respectfully submitted,

BROWN, HUBBARD, FELT & FULLER,
First National Bank Building,
Utica 2, New York;
HUNTON, WILLIAMS, ANDERSON,
GAY & MOORE,
Electric Building,
Richmond 12, Virginia;
Counsel for Appellants.

MOSES G. HUBBARD, JR.,
THOMAS B. GAY;
H. MERRILL PASCO,
Of Counsel.